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Supreme Court, U.S.
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NO. 97-2082

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1997

DEPUTY PAUL THRASH,

Petitioner,

v.

HERBERT GULLIFORD,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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I. RESPONDENT'S MISSTATEMENT OF THE CASE

Respondent denies he repeatedly was ordered to disperse prior to his arrest and dismisses petitioner's assertions otherwise as an attempt "to rewrite the facts of this case" and as "misrepresentations." Opp. Br. at 2. Respondent instead asks the Court to believe that the only real evidence before the jury was a videotape and accept his characterizations of it.[1] Such not only ignores that even the videographer admitted he did not record all statements made before the arrest, CR 164 at RT 71-72, but also that numerous witnesses testified such orders were given. Id at RT 27-28, 138, 286-88, 620, 647-48, 677-78, 759-60; Ex. 12 at 4; Ex. 14 at 2.

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[1] E.g. Respondent claims "the first order to disperse was issued after Mr. Gulliford was already on the ground," Opp. Br. at 2-3, when instead the videotape shows that order was directed by another deputy specifically to a bystander who refused to step back as Gulliford was resisting his arrest by petitioner. See CR 164 at RT 413, 553-54; Ex. 10 at "PM 11:55."

The Court instead is requested to review the actual records cited.

II. REASONS FOR GRANTING WRIT

A. WHETHER FIRST AMENDMENT MAKES A LAWFUL ARREST ACTIONABLE IS AT THE HEART OF THIS CASE.

Respondent concedes it is well settled that "[s]peech does not shield physical crimes," Opp. Br. at 5, but claims he "never moved" and hence "never performed any physical acts...." Id. 6. However, the record is replete with evidence that orders to disperse were given so that respondent's refusal to "move" and verbal confirmation of his refusal violated RCW 9A.84.020 (failure to disperse) and RCW 9A.76.020 (obstructing). See Pet. at 8-9.

Such evidence supported the jury's finding under the instructions that though respondent could not be arrested for "verbal opposition," he could be arrested for other "challenges" that are not "verbal opposition" but that obstruct an officer. CR

146, Inst. 15; Pet. at 10 n. 4.[2] The only reason for overturning the jury's verdict[3] then was the Ninth Circuit's erroneous legal conclusion that Gulliford's refusal to disperse and obstruction of the officers' attempt to arrest a felon was negated by his supposed right to speak.[4]

Such a holding is in direct conflict with that part of this Court's decision in Houston v. Hill, 482 U.S. 451, 462 n. 11

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[2] Respondent objects to examining the actual words of the instruction and makes no attempt to explain how they could be interpreted differently while still giving meaning to all the instruction's language. Opp. Br., p. 7.

[3] If, as respondent claims, the Ninth Circuit instead simply found there were no "non-verbal actions," Opp. Br. at 11, it did so contrary to the record, see cites supra at 2, in usurpation of the jury's role as fact finder, and in disregard of previous precedent interpreting a failure to obey lawful orders as warranting arrest without any First Amendment conflict. See Houston, 482 U.S. at 462 n. 11; Brice, 926 F.2d at 931; Lalonde, 35 Wn.App. at 61-62.

[4] As earlier noted, Pet. at 10 n. 4, instruction 15 was erroneous only in making "verbal opposition" absolutely protected and ignoring that words alone can constitute probable cause where likely to incite immediate lawlessness. See e.g. State v. Hoff, 22 F.3d 222, 224 (9th Cir. 1994). By disregarding this additional ground for the arrest, such only benefitted respondent.

(1987) never discussed by the Ninth Circuit, with that Circuit's own earlier rulings, United States v. Brice, 926 F.2d 925, 931 (9th Cir. 1991), and with Washington precedent on the First Amendment's impact on the crime of obstructing. State v. Lalonde, 35 Wn.App. 54, 61-62, 655 P.2d 421 (1983).

B. QUALIFIED IMMUNITY IS PRESENT PROCEDURALLY AND SUBSTANTIVELY

Petitioner's assertion of qualified immunity as an additional ground for upholding the jury's verdict is somehow characterized by respondent as "apparent arrogance" because an appellee cannot "enlarge the rights conferred by the original judgment" without a cross appeal. Opp. Br. at 7-8. Nowhere does respondent explain how an appellee's rights are "enlarged" by asserting an additional ground for affirming an existing verdict or why he ignores that a jury's verdict should be

affirmed on any ground supported by the record. See United States v. Washington, 969 F.2d 752, 755 (9th Cir. 1992), cert. denied, 507 U.S. 1051 (1993).

Though respondent concedes it is an "interesting question" whether state or federal precedent controls when a supposed right is "clearly established," he claims it is not presented here because the cited state case of State v. Lalonde, 35 Wn.App. at 61-62, is allegedly distinguishable in that he claims he was arrested solely for speech and not for "physical acts." Opp. Br. at 9-10. Such a claim is based on respondent's unexplained disregard of cited testimony establishing that his failure to "move" and his accompanying "verbal opposition" came after repeated orders to disperse. See record cites supra at 2.

Any fair comparison of Lalonde with the facts of this case confirms they are indistinguishable. In both cases a per-

son's attempts to talk to officers about their arrest of another member of a crowd after being told to leave resulted in a lawful arrest for obstructing under RCW 9A.76.020. In both cases the only "physical action" of the arrestees was their remaining despite officers' orders to leave so that their presence and verbal interference justified their arrest. Indeed here, plaintiff's failure to leave when ordered to do so was expressly confirmed by his words and attempt to incite a crowd with a known history of intimidation of officials. In both cases the arrestees' conduct was more than "mere speech" so that in both cases the arrestee's "offense did not arise from his speech, but from the act which accompanied his words." Lalonde, 35 Wn.App. at 61-62.

Petitioner had every reason to believe the arrest would be upheld in state court under the indistinguishable holding

of State v. Lalonde, and the Ninth Circuit's refusal even to address the case squarely raises whether state precedent can be ignored in determining if a right is "clearly established."

C. RESPONDENT FAILED TO OBJECT TO INSTRUCTION AND MET NO EXCEPTION

Respondent nowhere disputes his failure to object to instruction 15 on the ground it violated the First Amendment -- the ground relied upon for reversal -- but, without mentioning the doctrine or its requirements, appears to argue he met the "pointless formality" exception to FRCP 51. Opp. Br. at 15-17. Though respondent again claims petitioner's assertion otherwise "misstates the facts," is a "false" premise and a "continued misrepresentation of the District Court record," Opp. Br. at 12, 16, such apparently also applies to Judge O'Scannlain's dissent which mirrors petitioner's position. See

Gulliford v. Pierce County, 136 F.3d 1345, 1351-53 (9th Cir. 1998). Again, the actual record is at odds with respondent.

The "limited [useless formality] exception" exists where "(1) throughout the trial the party argued the disputed matter with the court, (2) it is clear from the record that the court knew the party's grounds for disagreement with the instruction, and (3) the party offered an alternative instruction." Id at 1349. As Judge O'Scannlain observed, "apart from noting that Gulliford submitted an alternative instruction ..., the majority does not point to anything in the trial record to support its conclusion that the pointless formality exception to Rule 51 applies here." Id at 1353.

Throughout the trial the issue of whether non-inciting words could be grounds for arrest was neither a "disputed matter" nor "argued with the court," but

was accepted by all. CR 27 at 16-7; CR 34 at 21; CR 49 at 6-10; CR 61 at 13; CR 64 at 15-17; CR 113 at 8; CR 154 at 4; CR 157 at 2-3.[5] Further "the record" shows the Court did not know "the party's grounds for disagreement with the instruction" because it repeatedly acknowledged before trial the applicability of this principle, see CR 59 at 6; CR 77, and confirmed that the jury would be allowed to apply it when it explained it would not give defendants' instruction on the right to arrest for plaintiff's non-verbal "conduct" of failing to disperse because:

> Almost all of the theories that have been discussed this morning in this brief discussion are in these jury instructions. I have put them in different ways, obviously, than counsel suggested,

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[5] Only respondent's belief Instruction 15 favorably stated he could not be arrested for "verbal opposition" explains why he took no exception on this ground when required to do so by FRCP 51, see CR 162 at RT 2-10, nor to the rejection of his alternative instruction despite the Court's specific request he do so. CR 162 at RT 2-3; CR 167 at RT 10.

> but a great deal of what you have urged here by way of exception is entirely arguable under the jury instructions.

CR 162 at RT 19 (emphasis added). Indeed, in later denying plaintiff's motion for a new trial which expressly claimed there was insufficient evidence to find criminal conduct accompanied his words, CR 154 at 2-6; CR 157 at 1-4, the District Court again confirmed that the "issues raised by Plaintiff were fully discussed and considered at trial." CR 156; Pet. at 25-26.

III. CONCLUSION

For the above reasons it respectfully is requested this Court grant certiorari.

DATED THIS 31st DAY OF JULY, 1998.

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